In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 522

JACKSON L. BOUGHNER, PETITIONER

v.

CHARLES F. SCHULZE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT SCHULZE IN OPPOSITION

This case involves the enforcement of an Internal Revenue summons issued during an investigation into the tax liability of an unknown taxpayer on whose behalf the petitioner, an attorney, delivered a cashier's check for $215,499.95 to the Internal Revenue Service on July 27, 1961 (R. 4-5).[1] The check was drawn on the LaSalle National Bank, and the sum-

[1] "R." refers to the original record in the court of appeals, which has been filed in this Court.

mons was issued to Arthur T. Rayunec, as auditor of that bank, to obtain the bank's records of the transaction (R. 5, 10, 12). Pursuant to petitioner's instructions, Rayunec refused to obey the summons (Pet. App. 6; R. 67-68). The government moved to enforce the summons, and petitioner was allowed to intervene in the action (R. 4-9, 53-66, 69, 140, 141). Petitioner contended that the bank had acted as his agent in the discharge of his professional responsibility to his client, and that the information in the bank's files was protected against disclosure by the attorney-client privilege (Pet. App. 7; R. 58-61). The district court rejected this contention (Pet. App. 8-13) and enforced the summons (R. 140). The court of appeals affirmed, holding that, since the only relationship created by the purchase of the cashier's check was that of debtor and creditor, petitioner had no rights in the bank's books and records (Pet. App. 3). The court also held that petitioner had not hired the bank to facilitate the communication of legal advice; that the bank did not render any confidential service; and that any communication of the client's name to the bank neither aided the giving of legal advice nor was necessary to the purchase of the check (Pet. App. 3-4).

The court of appeals correctly held that the attorney-client privilege did not bar the government from obtaining from the bank information in its files relating to the identity of the client for whom petitioner obtained the check, and there is no occasion for further review. In issuing the check, the

bank was not participating in the rendering of legal advice or service; it merely facilitated the transfer of money.[2] The attorney-client privilege does not cover communications made to a lawyer who is employed merely to transmit or deposit money (*McFee* v. *United States*, 206 F. 2d 872, 876 (C.A. 9), certiorari denied, 347 U.S. 927, denial of certiorari vacated, 347 U.S. 1007, remanded, 348 U.S. 905, reaffirmed, 221 F. 2d 807 (C.A. 9), certiorari denied, 350 U.S. 825; *Pollock* v. *United States*, 202 F. 2d 281, 286 (C.A. 5), certiorari denied, 345 U.S. 993), *a fortiori* it does not apply to communications made to a bank employed for that purpose. Thus, the only relationship between the bank and petitioner was that of debtor and creditor, and there is of course no privilege covering communications between such persons.

Since the attorney-client privilege did not cover the attorney's disclosure to the bank of the client's identity, it follows that such disclosure destroyed the confidentiality that is necessary for the privilege to exist. Accordingly, the information in the bank's records was not privileged, and the court correctly enforced the summons to give the government access to it. 8 Wigmore, *Evidence*, Sec. 2311 (McNaughton Rev. 1961); *Himmelfarb* v. *United States*, 175 F. 2d 924, 939 (C.A. 9); *United States* v. *Tellier*, 255 F. 2d 441, 446-448 (C.A. 2), certiorari denied, 358

[2] Indeed, as the court of appeals pointed out (Pet. App. 4), the petitioner need not have disclosed the client's identity to the bank at all, since he could have made the payments to the Service in cash.

U.S. 821; see also *United States* v. *Judson*, 322 F. 2d 460, 463 (C.A. 9); *Colton* v. *United States*, 306 F. 2d 633, 638 (C.A. 2), certiorari denied, 371 U.S. 951; *United States* v. *McDonald*, 313 F. 2d 832, 835 (C.A. 2).[3]

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicition General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

OCTOBER, 1965.

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[3] Petitioner's contention (Pet. 7-8) that the decision below is irreconcilable with the principle announced in *Reisman* v. *Caplin*, 375 U.S. 440, is frivolous. *Reisman* recognized that persons who would be affected by disclosure resulting from the enforcement of an Internal Revenue summons may intervene in the district court enforcement proceedings "and challenge the summons by asserting their constitutional or other claims" (p. 445). The district court in the present case accorded petitioner this right, since it permitted him to intervene to claim the privilege (Pet. App. 13; R. 140, 141). But nothing in *Reisman* suggests, as petitioner seemingly contends, that vindication of such right to intervene also requires acceptance of the intervenor's argument.

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